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IN THE

Supreme Court of the United States

October Term, 1963

No. 783

RON STORY and LOUIS MORENO,

Petitioners,

vs.

ANGELYNN YORK,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented for review	2
Constitutional provisions and statutes involved	3
Statement of the case	4
Reasons for granting the writ	5
Conclusion	11

Index to Appendices

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	1
Appendix B. Dissenting opinion	13
Appendix C. Judgment	16
Appendix D. Complaint for damages for violation of civil rights	17
Appendix E. Order dismissing complaint for lack of jurisdiction	20
Appendix F. Amended complaint for damages for violation of civil rights	22
Appendix G. Order dismissing action	26

TABLE OF AUTHORITIES CITED

Cases	Page
Association for Preservation of Freedom of Choice, Inc. v. Simon, 299 F. 2d 212	9
Brazier v. Cherry, 293 F. 2d 401	8
Cohen v. Norris, 300 F. 2d 24	8, 9
Coleman v. Johnston, 247 F. 2d 273	9
Curry v. Ragan, 257 F. 2d 449, cert. den. 358 U. S. 851	9
Davis v. Turner, 197 F. 2d 847	8
Downie v. Powers, 193 F. 2d 760	6
Earl C. Anthony, Inc. v. Morrison, 83 F. Supp. 494, aff. 173 F. 2d 897	7
Hague v. Committee for Industrial Org., 307 U. S. 496	6
Hallan Laboratories v. Topps Chewing Gum, 202 F. 2d 866	9
Hardwick v. Hurley, 289 F. 2d 529	9
Jennings v. Nester, 217 F. 2d 153, cert. den. 349 U. S. 958	8
Kenny v. Killian, 133 F. Supp. 571, aff. 232 F. 2d 288	7
Ker v. California, 374 U. S. 23	6
Lewis v. Brautigam, 227 F. 2d 124	8
Mapp v. State of Ohio, 367 U. S. 643	6
Monroe v. Pape, 365 U. S. 167	2, 5, 6, 7, 8, 10
Puett v. City of Detroit, Dept. of Police, 323 F. 2d 591	9
Screws v. United States, 325 U. S. 91	7, 8

Page

Smith v. Dougherty, 286 F. 2d 777, cert. den. 368 U. S. 903 7

Snowden v. Hughes, 321 U. S. 1, reh. den. 321 U. S. 804 6

Stringer v. Dilger, 313 F. 2d 536 ..... 7, 9

Tsermengas v. Pontiac Press, 199 F. Supp. 557 10

Wheedlin v. Wheeler, 373 U. S. 647 ..... 5, 6

Statutes

Criminal Code, Sec. 20 8

Revised Statutes of 1875, Sec. 1979 ..... 3, 6

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1343(3) (1958) 3

United States Code, Title 28, Sec. 1343(4) (1958) 3

United States Code, Title 42, Sec. 1983 ..... 2, 6, 7, 9

United States Code, Title 42, Sec. 1983 (1958) 3

United States Constitution, Fourth Amendment 2, 3, 4, 5, 6

United States Constitution, Fourteenth Amendment 2, 6, 9

United States Constitution, Fourteenth Amendment, Sec. 1 ..... 4, 6

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RON STORY and LOUIS MORENO,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Ron Story and Louis Moreno respectfully petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment of that court. The court below reversed and remanded a judgment of the District Court, dismissing the complaint on file herein, for failure to state a cause of action.

Opinion Below:

The opinion of the Ninth Circuit Court of Appeals was filed on October 28, 1963 and is reported in 324 F. 2d 450. The majority opinion is printed herein as Appendix A to this petition. The dissenting opinion is printed herein as Appendix B. The Judgment is printed herein as Appendix C.

Jurisdiction.

Jurisdiction is conferred by Title 28 U. S. C. §1254(1). The decision of the United States Court of Appeals was filed on October 28, 1963. This petition for certiorari is filed within 90 days.

Questions Presented for Review.

1. If a witness voluntarily appears at a local police station to complain of an assault upon her person and requests police action, and the officers thereupon advise her that nude photographs are necessary, and take and circulate such pictures without her consent, do these acts constitute an invasion of a Constitutionally protected right sufficient to state a cause of action under the Federal Civil Rights Act (42 U. S. C. §1983)?

2. Assuming that such acts involve no search, seizure, arrest, or physical force or brutality, but constitute an actionable tort under state law, is such an invasion of the right of privacy a violation of the Due Process Clause of the Fourteenth Amendment?

3. Assuming *arguendo* that such conduct is obscene or offensive to the sensibilities, should this fact alone result in the extension of the holding of *Monroe v. Pape*, 365 U. S. 167 to include all invasions of privacy in the absence of any illegal arrest, search, or seizure?

4. Since the right of privacy protected by the Fourth Amendment and incorporated in the Due Process Clause of the Fourteenth Amendment, is the right to be free from unreasonable searches and seizures, should the Federal Civil Rights Act be so construed as to include other invasions of privacy, and if so what provisions of the Federal Constitution protect against invasions of privacy not resulting from illegal arrests, searches and seizures?

Constitutional Provisions and Statutes Involved.

Title 28, U. S. Code §1343(3) and (4) (1958):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * "(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; "(4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Rev. Stat. §1979 (1875), 42 U. S. Code §1983 (1958):

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment, Section 1.

> . . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . . . .

Statement of the Case.

A complaint for damages was filed by Respondent Angelynn York against Petitioners, police officers of the City of Chino, California (App. D). The complaint was dismissed by the District Court for failure to state a cause of action under the Federal Civil Rights Act on the ground that the invasion of privacy which is the subject of the complaint was not incident to an arrest, search or seizure and was not protected by the United States Constitution, Fourth Amendment (App. E).

An amended complaint, with substantially the same allegations, was filed (App. F) and dismissed on the same ground (App. G), whereupon Respondent appealed from the judgment of dismissal, which was reversed by the court below (App. A) with a dissenting opinion (App. B). The amended complaint alleges in substance that Respondent went to the local Police Department to file charges for an assault upon her person. There, Petitioner Story, a police officer, advised her that it was necessary to take photographs of her, directed her to undress, directed her to assume various indecent positions and photographed her not for any lawful or legitimate purpose. York objected to undressing, stating there was no need to take photographs because the bruises would not show up in the photographs. Later, Petitioner Story advised York that the pictures were destroyed but instead, he circulated these photographs

among the personnel of the Police Department. Several months later Petitioner Moreno, using police photographic equipment at the police station, made additional prints of the photographs and circulated these prints among the personnel of the Police Department.

Reasons for Granting the Writ

1. This case presents important questions construing and determining the scope of the Federal Civil Rights Act and it is in the public interest to determine which invasions of privacy involve a constitutionally protected right and which involve only private wrongs.

2. The court below has misconceived, misapplied and misconstrued the applicability of the decision of this Court in *Monroe v. Pape*, 365 U. S. 167 (1961) by applying the concept of Due Process to an invasion of privacy which did not include unreasonable search and seizure or unlawful arrest.

3. Although this case is novel because it involves plaintiff who was not in custody, was not accused of or suspected of a crime, and did not involve an arrest, search or seizure, the decision seems inconsistent with recent cases which have been decided under the Federal Civil Rights Act. (See *Wheedlin v. Wheeler*, 373 U. S. 647 (1963).

The right of privacy in the instant case is not and should not be held to be a constitutionally protected right. This was the basis for the dismissal of the complaint by the trial court (App. E) and for the dissenting opinion in the Circuit Court (App. B). The allegations do not establish an unreasonable search and seizure. The Fourth Amendment prohibiting unreasonable searches and seizures has been applied to the states

through the Fourteenth Amendment, *Monroe v. Pape*, 365 U. S. 167 (1961); *Mapp v. State of Ohio*, 367 U. S. 643 (1961); *Ker v. California*, 374 U. S. 23 (1963) and when an invasion of privacy under color of state authority results from an unreasonable search and seizure it gives rise to a cause of action under the Federal Civil Rights Act. *Monroe v. Pape, supra*, 365 U. S. 167.

But these cases do not purport to create a *new* constitutional right to privacy.

In *Wheedlin v. Wheeler*, 373 U. S. 647 (1963), a complaint did not state facts sufficient to constitute a cause of action under 42 U. S. C. §1983 as violating plaintiff's constitutional rights under the Fourth Amendment where it was alleged a federal officer without authority issued a subpoena to plaintiff to testify before the House Un-American Activities Committee. The Court held that the Fourth Amendment protects a person against unreasonable search or seizure and there was no search or seizure nor was plaintiff arrested or detained pursuant to subpoena. Therefore, the Federal Rights Act was clearly inapplicable to the invasion of privacy there involved.

The Federal Civil Rights Act, 42 U. S. C. §1983, Rev. Stat. §1979, grants redress only for that which the Fourteenth Amendment, Section 1 of the United States Constitution condemns and forbids and is intended to cover only the rights, privileges and immunities secured by the due process, equal protection and privileges and immunities clause. *Snowden v. Hughes*, 321 U. S. 1 (1943) (Reh. den. 321 U. S. 804); *Hague v. Committee for Industrial Org.*, 307 U. S. 496, 510 (1939); *Dozonic v. Powers*, 193 F. 2d 760, 765 (C. A.

Okla. 1951); *Kenny v. Killian*, 133 F. Supp. 571, 577 (D.C. Mich. 1955, Aff. 232 F. 2d 288 (1956); *Earl C. Anthony, Inc. v. Morrison*, 83 F. Supp. 494, 495 (D.C. Cal. 1948, Aff. 173 F. 2d 897 (1949)).

The purpose of the Federal Civil Rights Act was (1) to override certain kinds of state laws; (2) to provide a remedy where state laws are inadequate; (3) to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice (*Monroe v. Pape, supra*, pp. 173-183). Justices Harlan and Stewart in their concurring opinion, stated that Congress had no intention of taking over the whole field of ordinary state torts and crimes (*Monroe v. Pape, supra*, p. 193).

All invasions of privacy under color of state authority, even though they constitute a tort under applicable State law, do not, therefore, state a cause of action under the Federal Civil Rights Act. It is only that invasion of privacy resulting from an unreasonable search and seizure which is a violation of a constitutionally protected right.

The majority in the court below lays great stress on the fact that the subject of the invasion of privacy involved a naked body. The decision seems to hold that an ordinary invasion of the right of privacy gives rise to a cause of action under the Federal Civil Rights Act.

The decisions are clear that 42 U. S. C. §1983 was not enacted to discipline local law enforcement officials, and that there must be an actual denial of due process before a cause of action arises. *Screws v. United States*, 325 U. S. 91, 98 (1945); *Stringer v. Dilger*, 313 F. 2d 536, 540 (10 Cir. 1963); *Smith v. Dougherty*, 286 F. 2d 777, 778 (7 Cir. 1961) cert. den. 368 U. S. 903

(1961); *Jennings v. Nester*, 217 F. 2d 153 (7 Cir.) cert. den. 349 U. S. 958.

In *Screws v. United States*, *supra*, where a sheriff beat a prisoner to death and was convicted of depriving the prisoner of life without due process of law under Section 20 of the Criminal Code, providing a penalty for wilfully depriving one of a constitutional right, this Court reversed, holding that:

> "The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States . . ." (*Screws v. United States*, 325 U. S. 91, 108, 109 (1945)).

We know of no case where the Federal Civil Rights Act has been held to have been violated where the complainant suffered mere humiliation; as in the instant case (see *Cohen v. Norris*, 300 F. 2d 24, 33 (9 Cir. 1962) indicating that mere humiliation is not sufficient).

The cases decided under the Federal Civil Rights Act have held the following to be violations: illegal search and seizure with unlawful arrest and detention;[1] illegal arrest and assault resulting in death;[2] illegal arrest and seizure with physical abuse and refusal to allow consultation with attorneys;[3] use of threats and intimidation to coerce a guilty plea;[4] illegal arrest and detention without preferring charges or providing medical atten-

[1] *Monroe v. Pape*, *supra*, 365 U.S. 167;
[2] *Brazier v. Cherry*, 293 F. 2d 401 (5 Cir. 1961);
[3] *Davis v. Turner*, 197 F. 2d 847 (5 Cir.);
[4] *Lewis v. Brautigam*, 227 F. 2d 124 (5 Cir.);

tion;[5] illegal arrest and seizure with excessive force, denial of right to bail and coercion to plead guilty;[6] illegal search and seizure with brutality;[7] assault and beating to compel self-incrimination.[8]

But contrast *Puett v. City of Detroit, Dept. of Police*, 323 F. 2d 591 (6th Cir. 1963). There the court dismissed a complaint for failure to state a cause of action under 42 U. S. C. §1983 where the complaint alleged false arrest and malicious prosecution.

The facts alleged in the instant case present at most an invasion of privacy under color of state authority, but *no* facts are alleged which would deprive Respondent of a constitutional right. The right of privacy involved in the publication of one's picture derives from state statutes and state common law. See *Haelan Laboratories v. Topps Chewing Gum*, 202 F. 2d 866; 868 (2 Cir. 1953).

A cause of action for alleged libel against a state officer has no connection with any federally protected right, but solely with a right arising out of state law. *Association for Preservation of Freedom of Choice, Inc. v. Simon*, 299 F. 2d 212 (2 Cir. 1962).

Neither the Fourteenth Amendment nor the Civil Rights Act purports to secure a person against unfounded or even malicious claims or suits in state courts (suit against Justice of Peace, Clerk of Court and three city police officers). *Curry v. Ragan*, 257 F. 2d 449, 450 (5 Cir. 1958), cert. den. 358 U. S. 851.

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[5] *Coleman v. Johnston*, 247 F. 2d 273 (7 Cir. 1957).
[6] *Stringer v. Diliger*, *supra*, 313 F. 2d 536.
[7] *Cohen v. Norris*, *supra*, 300 F. 2d 24.
[8] *Hardzeck v. Harley*, 289 F. 2d 529 (7 Cir. 1961).

(See *Tsermengas v. Pontiac Press*, 199 F. Supp. 557 (1961), where the court stated that newspaper sensationalism is not prejudicial in the constitutional sense except where the prospect of a fair trial is beclouded, so that denial of due process would be found).

These cases support petitioners' contention that an invasion of privacy unless arising from an illegal search and seizure does not violate any constitutionally protected right.

In the case at bar, nude pictures were taken of a complaining witness by police officers in connection with a complaint for criminal assault and battery. The pictures were taken at the police station; they were never circulated outside the Police Department; complainant was not the subject of a criminal charge; nor was there any evidence seized to be used against her; no violence or brutality were involved; there were no acts which would offend fundamental principles of justice or the requirements of decency, and fairness implicit in the concept of ordered liberty. This is not a case where there was any effort by state authorities to flout paramount federal law. At most, the complainant could state a cause of action for a private civil wrong, but certainly the rights allegedly violated herein do not rise to constitutional importance. The salutary results of *Monroe v. Pape*, 365 U. S. 167 should not be diluted by extending the holding therein to encompass every trivial tort committed under color of state authority within the Federal Civil Rights Act. As the dissenting opinion of the court below (App. B) states:

> "When an invasion of privacy is part of, or incident to, an unreasonable search and seizure, it rises to constitutional importance. *Monroe v. Pape*,

365 U.S. 167 (1961); *District of Columbia v. Little, supra;* [178 F 2d 13 (4 Cir 1949)].; and when the victim of police misconduct is a prisoner or a person accused or suspected of crime, his right to freedom from such misconduct deserves constitutional protection. *Logan v. United States, supra; Hughes v. Noble, supra.* But in a case involving facts such as those alleged here, there is no more than a private wrong; and the person aggrieved should be left to his civil remedies in the State Courts. The Civil Rights Act should be construed so as to respect the proper balance between the states and the federal governments . . . *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951)."

If the present decision of the court below is allowed to stand it would serve as strong precedent for the proposition that every act of state police officers acting under color of authority which constituted any kind of invasion of privacy would be a violation of the Federal Civil Rights Act.

Conclusion.

Wherefore, Petitioners pray that this Honorable Court grant certiorari and review and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Angelynn York, Appellant, vs. Ron Story and Louis Moreno, Appellees. No. 18,280. Oct. 28, 1963.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Hamley and Browning, Circuit Judges and MacBride, District Judge.

Hamley, Circuit Judge:

This action was brought by Angelynn York against three officers of the Police Department of the City of Chino, California, to recover damages for taking and distributing photographs of her in the nude. District court jurisdiction was asserted under 28 U.S.C. § 1343 (3) and (4) (1958),[1] it being alleged that the claim arises under Rev. Stat. § 1979 (1875), 42 U.S.C.

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[1] Title 28, § 1343 reads, in pertinent part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

§ 1983 (1958).[2] The action was dismissed on motion. Plaintiff appeals.[3]

We first state the allegations of the amended complaint. In October, 1958, appellant went to the police department of Chino for the purpose of filing charges in connection with an assault upon her. Appellee Ron Story, an officer of that police department, then acting under color of his authority as such, advised appellant that it was necessary to take photographs of her. Story then took appellant to a room in the police station, locked the door, and directed her to undress, which she did. Story then directed appellant to assume various indecent positions, and photographed her in those positions. These photographs were not made for any lawful or legitimate purpose.

Appellant objected to undressing. She stated to Story that there was no need to take photographs of her in the nude, or in the positions she was directed to take.

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[2]This provision of the Civil Rights Act was originally enacted as a part of the Civil Rights Act of 1871, § 1, 17 Stat. 13. It was later reenacted, as positive law, as Rev. Stat. § 1979 (1875). It appears in Title 42, U.S.C. as § 1983. But since Title 42, unlike Title 28 and sixteen other titles, has not been enacted into positive law [Preface, U.S.C. (Supp. IV 1963)], it is only "prima facie" evidence of the law, 1 U.S.C. § 204(a) (1958). The references throughout this opinion will therefore be to section 1979, meaning Rev. Stat. § 1979 (1875).

Rev. Stat. § 1979, 42 U.S.C. § 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3]Process was not served upon one of the defendants, Henry Grote, and he did not appear in the district court. Consequently Grote is not an appellee here.

because the bruises would not show in any photograph. A policewoman was present at the police station but was not requested to be present in the room where the pictures were taken, and was not present. No person except appellant and Story was present in the room when the pictures were taken.

Later that month, Story advised appellant that the pictures did not come out and that he had destroyed them. Instead, Story circulated these photographs among the personnel of the Chino police department. In April, 1960, two other officers of that police department, appellee Louis Moreno and defendant Henry Grote, acting under color of their authority as such, and using police photographic equipment located at the police station made additional prints of the photographs taken by Story. Moreno and Grote then circulated these prints among the personnel of the Chino police department. Appellant did not learn of the described actions of Story, Moreno and Grote in distributing these photographs until December, 1960. The amended complaint closes, save for the prayer, with the two paragraphs quoted in the margin.*

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*"V. All of the acts of the defendants aforesaid were as police officers of said Chino Police Department; but were in excess of their authority as such police officers. Said acts violated and deprived plaintiff of her right to privacy and liberty and constituted an unreasonable search and seizure contrary to and prohibited by the Fourth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act.

"VI. The acts of the defendants aforesaid were committed unlawfully, intentionally, maliciously and oppressively, with the knowledge on the part of the defendants that they were exceeding their authority as police officers and with the further knowledge that they were depriving the plaintiff of rights guaranteed to her by the Constitution of the United States and by the Federal Civil Rights Act, by virtue whereof the plaintiff is entitled to punitive and exemplary damages."

In dismissing the action the district court held that the amended complaint did not state a claim under section 1979, and that the court was therefore without jurisdiction to entertain the suit.

The holding of the district court that it lacked jurisdiction must be regarded as surplusage. Under 28 U.S.C. § 1343(3), a federal district court has jurisdiction, among other things, to entertain a suit to recover damages suffered by reason of the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. Under 28 U.S.C. § 1343(4), a federal district court has jurisdiction, among other things, to entertain a suit to recover damages under any act of Congress providing for the protection of civil rights.

In the amended complaint appellant specifically invoking these subsections as a basis for jurisdiction, attempted to state a claim under section 1979. This was enough to establish district court jurisdiction, whether or not appellant succeeded in stating such a claim.

Where, as here, the Constitution and laws of the United States, if given the meaning ascribed to them by the plaintiff, establish a claim for relief in the federal courts on the basis of the facts alleged, the problem of determining whether the Constitution and laws have that meaning presents not a jurisdictional question but only one as to the sufficiency of the pleading to state a claim.[5] The court in fact assumed jurisdiction when it decided, on the merits, that the amended complaint did not state a claim under section 1979.

[5] See *Wheeldin v. Wheeler*, 373 U.S. 647, 649; *Bell v. Hood*, 327 U.S. 678, 682, 685; *Harris v. Superior Court*, 9 Cir., 307 F.2d 796, 798.

The only question before us, therefore, is whether the district court erred in holding that the amended complaint did not state a claim under section 1979. In determining that question due regard must be had for the accepted rule that a complaint is not subject to dismissal on the ground that there is a failure to state a claim upon which relief can be granted, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*; 355 U.S. 41, 45-46. This rule is applicable in civil rights actions. *Marshall v. Sawyer*, 9 Cir., 301 F.2d 639, 647; *Cohen v. Norris*, 9 Cir., 300 F.2d 24, 31.

A complaint states a claim under section 1979, if the facts alleged show that the defendant: (1) while acting under color of state or local authority, (2) subjected the plaintiff, or caused the plaintiff to be subjected, to the deprivation of any rights, privileges or immunities secured to the plaintiff by the Constitution and laws of the United States. *Marshall v. Sawyer*, at page 646; *Cohen v. Norris*, at page 30.

The facts alleged in a complaint are sufficient with regard to the first of these elements if they lay a groundwork for proof that, at the time in question, the defendant was clothed with the authority of state or local government and was purporting to act thereunder. *Screws v. United States*, 325 U.S. 91, 111; *Marshall v. Sawyer*, at page 646.

As a foundation for proving that appellees were, at the relevant times, clothed with such authority, it was alleged that they were then police officers of the City of Chino. As a foundation for proving that, in performing the acts complained of, appellees were purport-

ing to act under such authority, it was alleged that all such acts were performed at the police station, police equipment was used, the initial photographing was done in purported processing of a complaint appellant had made to the police, and the distribution of the photographs was to other members of the police department. There was also the general allegation, quoted in note 3, that "(a)ll of the acts of the defendants were as police officers of said Chino Police Department. . . ."

It does not appear to us beyond doubt that appellant cannot, under these allegations, prove a set of facts establishing that, at the times in question, appellees were clothed with the authority of local government and that in performing the acts complained of they were purporting to act under such authority. It follows, to apply the rule recognized in *Conley v. Gibson*, 355 U.S. 41, 45-46, that the amended complaint was not subject to dismissal on the ground that it fails to allege facts showing that appellees were acting under color of local authority.

Our view in this regard apparently accords with that of the district court, since the amended complaint was not dismissed on the ground of failure to allege that appellees were acting under color of local authority. It is also to be noted that appellees do not contend that the amended complaint is deficient as to this ingredient of a civil rights action.[6] It hardly need be added that

[6] Far from questioning the sufficiency of the complaint on this ground, appellees in effect argue that the evidence will support the allegation that appellees were acting under color of local authority. Concerning the taking of the photographs, appellees state, in their brief:

"The taking of photographs was not an invasion of privacy but only an attempt to preserve evidence which Appellees, as

the question of whether appellant can prove that appellees were clothed with local authority, and were purporting to act pursuant thereto in doing the things complained of, does not concern us now.

The district court's determination that this pleading does not state a claim under section 1979, rests solely upon the ground that, under the allegations of the amended complaint, appellant had not been deprived of any federally-protected right.

Contending that the district court erred in this regard, appellant advances alternative arguments, as follows: (1) under the facts alleged there was an unreasonable search within the meaning of the Fourth Amendment[7] and since the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment,[8] she was protected from such a search at the hands of city police officers; (2) the Fourth Amendment is premised upon a basic right of privacy, made

police officers, are authorized to do and which was done with the implied consent and cooperation of Appellant."

Concerning the distribution of the photographs, appellees state in their brief:

"Since the photographs were lawfully obtained, it was not improper for authorized personnel to review or discuss them."

[7]The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[8]The Due Process Clause of the Fourteenth Amendment reads: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

available to appellant as against city police officers by reason of the Due Process Clause of the Fourteenth Amendment, which right was violated without regard to whether such violation constituted an unreasonable search in the Fourth Amendment sense; and (3) the alleged acts of appellees constituted such an invasion of appellant's privacy as to amount to a deprivation of liberty, without due process of law, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment.

The alleged act of Story in taking photographs of appellant in the nude, if proved, may or may not constitute an unreasonable search in the Fourth Amendment sense. But if we should hold that it does, this would not dispose of the whole case for the alleged subsequent acts of Story and Moreno in distributing prints of these photographs, of which appellant also complains, could hardly be characterized as unreasonable searches.

It is therefore necessary, in any event, to reach appellant's second or third argument, or both, relating to invasions of privacy. Accordingly, we turn at once to appellant's third contention—that all of these acts constituted such invasions of her privacy as to amount to deprivations of liberty without due process of law, guaranteed to her by the Due Process Clause of the Fourteenth Amendment.

We are not called upon to decide as an original proposition whether "privacy," as such, is comprehended within the "liberty" of which one may not be deprived without due process of law, as used in the Due Process Clause of the Fourteenth Amendment.[9] For it has al-

[9]Perhaps no more complete description of what is included in the term "liberty" can be found than is expressed in *Meyer* v.

ready been declared by the Supreme Court that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and is therefore "implicit in the concept of ordered liberty," embraced within the Due Process Clause of the Fourteenth Amendment.[19]

What we must decide, however, is whether the acts of the police, as here alleged, constitute an arbitrary invasion upon the security of one's privacy in this Due Process sense.

We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if "unreasonable," is arbitrary and therefore banned under the

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Nebraska, 262 U.S. 390, 399, where the Court said:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

[19] This declaration was first made in *Wolf v. Colorado*, 338 U.S. 25, 27. See also *Rochin v. California*, 342 U.S. 165; *Mapp v. Ohio*, 367 U.S. 643, 650; *Frank v. Maryland*, 359 U.S. 360, 366-367. For other expressions to the effect that the Due Process Clause of the Fourteenth Amendment exacts from the states all that is implicit in the concept of ordered liberty, see *Rochin v. California*, 342 U.S. 165, 169; *Palko v. Connecticut*, 302 U.S. 319, 325; *Snyder v. Massachusetts*, 291 U.S. 97, 105; *Twining v. New Jersey*, 211 U.S. 78, 106.

Fourth Amendment.[11] We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not.

Nor can we imagine a more arbitrary police intrusion upon the security of that privacy than for a male officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault upon her, over her protest that the photographs would show no injuries, and at a time when a female police officer could have been, but was not, called in for this purpose, and to distribute those photographs to other personnel of the police department despite the fact that such distribution of the photographs could not have aided in apprehending the person who perpetrated the assault.

But granting all of that, must it still be held that the particular intrusions here alleged are not secured against by the Due Process Clause of the Fourteenth Amendment because they are not expressly proscribed in the Bill of Rights?

We think not. In the field of civil rights litigation the cases are not infrequent in which law enforcement action not banned in terms by any provision of the Bill of Rights has been made the subject of a successful claim.[12]

[11] *Mapp v. Ohio*, 367 U.S. 643, 656. See, also, *Frank v. Maryland*, 359 U.S. 360, 362; *Stefanelli v. Minard*, 342 U.S. 117, 119; *Weeks v. United States*, 232 U.S. 383, 391; *Boyd v. United States*, 116 U.S. 616, 622.

[12] Assaults by police officers upon persons under arrest: *Stringer v. Dilger*, 10 Cir., 313 F.2d 536; *Frazier v. Cherry*, 5 Cir., 293 F.2d 401; *Hardwick v. Hurley*, 7 Cir., 289 F.2d 529; *Geach v. Moynahan*, 7 Cir., 207 F.2d 714; *Koehler v. United*

All of the cases just cited involved persons who were in police custody at the time of the incident complained of. This circumstance, however, is indicative only of the infrequency of a case such as this, in which one not in custody is the alleged victim of arbitrary police action. No statute, decision or principle that we know of makes the Civil Rights Act available to those in the toils of the law, but closes the federal courthouse to law-abiding citizens who have suffered just as grievous a deprivation of constitutional rights.

This case is novel not only in the respect just mentioned, but also with regard to the precise nature of the arbitrary police action complained of. But, as Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 472, long ago made clear, the Constitution is capable of meeting new problems.[13]

The fact that this is the first such case to reach a court of appeals indicates that civil rights actions of this kind are not likely to swamp the federal courts. But, in any event, as we said in *Cohen v. Norris*, 9 Cir., 300 F.2d 24, 34, in commenting upon the fear expressed in *Hardwick v. Hurley*, 7 Cir., 289 F.2d 529,

States, 5 Cir., 189 F.2d 711. Refusal by police officers to provide necessary medical attention for one held in custody: *Hughes v. Noble*, 5 Cir., 295 F.2d 495; *Koehler v. United States*, *supra*.

[13] Justice Brandeis said:

"We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387; *Buck v. Bell*, 275 U.S. 200. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."

530, that the decision in *Monroe v. Pape*, 365 U.S. 167, "may well open the flood gates," if giving effect to the Congressional intent manifested in section 1979 will "open the flood gates," the remedy, if one is needed, is not for this court, but for Congress, to prescribe. It is no legitimate concern of ours whether a decision, correct under present law, will add to the work load of the courts.

Appellees assert that appellant has a civil remedy in the courts of California. But it is immaterial, insofar as the right to pursue remedies under the Civil Rights Act is concerned, that state remedies may also be available. *McNeese v. Board of Education*, 373 U.S. 668, 671.[14]

We therefore conclude that, under the allegations of the amended complaint, appellant has laid a foundation for proving, if she can, not only that appellees were acting under color of local authority at the times in question, but that such acts constituted an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment. It was therefore error to dismiss the action on the ground that the amended complaint did not state a claim upon which relief can be granted.

The judgment is reversed and the cause is remanded for further proceedings.

[14] To the same effect, see *Monroe v. Pape*, 365 U.S. 167, 183; *Cohen v. Norris*, 9 Cir., 300 F.2d 24, 34.

APPENDIX B.

MacBride, District Judge:

I respectfully dissent. I believe that the facts alleged are insufficient to establish a violation of appellant's constitutional rights and, therefore, that they do not state a claim under the Civil Rights Act, 42 U.S.C. §1983.

In a case involving facts such as those alleged here, the right to privacy is not, and should not be held to be, a constitutional right.

In the first place, the allegations do not establish an unreasonable search and seizure. The Fourth Amendment prohibits unreasonable searches and seizures. Recent Supreme Court cases have established that the Fourth Amendment's prohibition applies to the states through the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963). But these cases did not create a broad, new constitutional right to privacy; they merely made the existing right to privacy which is implicit in the Fourth Amendment's prohibition applicable to the states. This prohibition applies primarily to searches for evidence to be used in a criminal prosecution against the person searched. See *Frank v. Maryland*, 359 U.S. 360, 365-366 (1959). But see 359 U.S. 369 (dissenting opinion). When an unreasonable invasion of privacy in the home is involved, it may also apply to a search which is unrelated to a criminal prosecution. *District of Columbia v. Little*, 178 F. 2d 13 (4th Cir. 1949). See *Frank v. Maryland*, *supra*, 374-384 (dissenting opinion).

Since the facts alleged here involve neither criminal proceedings against the appellant nor an invasion of privacy in the home, I cannot hold that they come within the constitutional prohibition against searches and seizures.

Moreover, I cannot agree that, apart from any question of unreasonable search and seizure, the allegations show such an invasion of appellant's privacy as to amount to a deprivation of liberty without due process. In a particular set of facts, there may be a constitutional right to privacy. *See Public Utilities Commission v. Pollack*, 343 U. S. 451, 467 (dissenting opinion). See also Pound, The Fourteenth Amendment and the Right of Privacy, 13 Western Res. Law Rev. 34, 54-55. Here, however, the allegations show only that appellant suffered great and unjustified mental suffering, not that any of her basic constitutional rights were prejudiced; and the mere fact that appellant was a complaining witness and the alleged acts of appellees were, to some extent, connected with their official duties as policemen does not, I feel, require a different conclusion.

The present case is different from the ones involving maltreatment of prisoners or persons accused or suspected of crime. *Stringer v. Dilger*, 313 F. 2d 536 (10th Cir. 1963); *Hardwick v. Hurley*, 289 F. 2d 529 (7th Cir. 1961); *Hughes v. Noble*, 295 F. 2d 495 (5th Cir. 1961). Such persons, in effect, occupy a "preferred position." Maltreatment of them is more likely to have constitutional implications than maltreatment of other persons. *See Frank v. Maryland, supra*, 365-366. The government has a right to hold prisoners for offenses against it and a corresponding duty to protect such prisoners, while so held, against assault and injury;

and the prisoners, in turn, have a *constitutional* right to such protection. *Logan v. United States*, 144 U.S. 263 (1892).

When an invasion of privacy is part of, or incident to, an unreasonable search and seizure, it rises of constitutional importance. *Monroe v. Pape*, 365 U.S. 167 (1961); *District of Columbia v. Little*, *supra*; and when the victim of police misconduct is a prisoner or a person accused or suspected of crime, his right to freedom from such misconduct deserves constitutional protection. *Logan v. United States*, *supra*; *Stringer v. Dilger*, *supra*; *Hardwick v. Hurley*, *supra*; *Hughes v. Noble supra*. But in a case involving facts such as those alleged here, there is no more than a private wrong; and the person aggrieved should be left to his civil remedies in the State Courts. The Civil Rights Act "should be construed so as to respect the proper balance between the states and the federal government . . . ". *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951).

For the reasons stated, I would affirm the judgment below.

(Endorsed) Opinion and Dissenting Opinion Filed October 28, 1963.

Frank H. Schmid, Clerk.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

Angelynn York, Appellant, vs. Ron Story and Louis Moreno, Appellees No. 18,280.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof: It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that the cause be and hereby is remanded to the said District Court for further proceedings, with costs in favor in favor of appellant and against appellee.

It is further ordered and adjudged that appellant recover against appellees for her costs herein expended and have execution therefor.

APPENDIX D.

Complaint for Damages for Violation of Civil Rights.

In the United States District Court Southern District of California Central Division.

Angelynn York Plaintiff, v. Ron Story, Louis Moreno and Henry Grote, Defendants.

The plaintiff complains of the defendants and alleges:

I

Plaintiff is a citizen of the United States.

II

The defendants are officers of the Police Department of the City of Chino, State of California: the defendants Story, Moreno and Grote being police officers; they will be hereinafter so designated; at all times herein said defendants acted under color of authority as such officers.

III

This Court has jurisdiction herein under the Federal Civil Rights Act, 42 USC 1953 and 28 USC Sec. 1343(3) and (4).

IV

In October, 1958, the plaintiff went to the police department of the City of Chino, for the purpose of filing charges in connection with an assault upon her.

She was advised by the defendant, Story, that it was necessary to take photographs of her; he took the plaintiff in said police station, locked the door and directed the plaintiff to undress. Thereupon he took photographs

of the plaintiff in the nude. He directed the plaintiff to take various indecent positions, one of which was sitting in the nude, with her legs spread apart; thereupon said defendant took photographs of the plaintiff in that and other positions.

The plaintiff objected to being undressed, and stated to said defendant that there was no need to take photographs of the plaintiff in the nude, or in the positions aforesaid, because the bruises would not show up in any photograph.

A policewoman was present at said police station, but was not requested to be present in the room where the pictures were taken, and was not present in said room; nor was any other person, other than the plaintiff and said defendant.

Thereafter, and in October, 1958, said defendant advised plaintiff that the pictures did not come out and that they were destroyed by him.

Instead, said defendant circulated said photos among the personnel of the police department of the City of Chino.

In April, 1960, the defendants, Moreno and Grote, at said police station in Chino, using police photographic equipment, made duplicates of said photographs, and thereupon and thereafter, circulated said duplicates among the personnel of the Chino Police Department.

The plaintiff did not learn of the action of the defendants, Moreno and Grote aforesaid, nor the action of the defendant Story aforesaid, pertaining to the circulation by him of the photographs, until December of 1960.

V

All of the acts of the defendants aforesaid were as police officers of said Chino Police Department but were in excess of their authority as such police officers; they violated the plaintiff's right and privacy, and constituted an unreasonable search and seizure prohibited by the Fourth Amendment of the Constitution of the United States and by the Federal Civil Rights Act.

VI

The acts of the defendants aforesaid were committed unlawfully, intentionally, maliciously and oppressively, with the knowledge on the part of the defendants that they were exceeding their authority as police officers and with the further knowledge that they were depriving the plaintiff of rights guaranteed to the plaintiff by the Constitution of the United States and by the Federal Civil Rights Act; by virtue whereof the plaintiff is entitled to punitive and exemplary damages.

WHEREFORE the plaintiff prays for damages as to each of the defendants as follows:

1. The sum of Ten Thousand ($10,000.00) as actual damages;

2. The sum of Fifteen Thousand ($15,000.00) additionally as punitive damages;

3. For costs of suit herein; and

4. For such other and further relief as to the Court seems just and proper.

A. L. Wirin
Fred Okrand

By

A. L. Wirin
Attorneys for plaintiff

APPENDIX E.

Order Dismissing Complaint for Lack of Jurisdiction.

United States District Court, Southern District of California, Central Division.

Angelynn York, Plaintiff, vs. Ron Story, Louis Moreno and Henry Grote, Defendants. No. 898-61-S.

No claim upon which relief may be granted under 42 U.S.C. §1983 or 28 U.S.C. §1343(3) and (4) is stated by the complaint in this action.

In order for federal jurisdiction to be established under these statutes it must be shown that (1) the defendant acted under color of law, and (2) that the plaintiff be subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Briefly stated, plaintiff asserts that the core of the Fourth Amendment is freedom from invasion of the right of privacy, as such, and not necessarily incident to unlawful arrest or unreasonable search and seizure. Jurisdiction has been recognized in the following cases: *Mulroe v. Pape*, 365 U.S. 167, 169; *Cohen v. Morris* (9th Cir., Jan. 30, 1962) .....F. 2d .....; *Hoffman v. Halden* (9th Cir., 1958) 268 F. 2d 280, *Hardwick v. Hurley* (7th Cir., 1961) 289 F. 2d 529; *Jackson v. Duke* (5th Cir., 1958) 259 F. 2d 3; *Coleman v. Johnston* (7th Cir., 1957) 247 F. 2d 273; *Lewis v. Brantigam* (5th Cir., 1955) 227 F. 2d 124; *Davis v. Turner* (5th Cir., 1952) 197 F. 2d 847; *Solico v. Jackson* (D.C., S.D. Cal., Jan. 23, 1961) ..... F. Supp. .....; *McCullum v. Mayfield* (D.C., N.D. Cal., 1955) 130 F. Supp. 112; *Gordon v. Garrson* (D.C., E.D., Ill., 1948) 77 F. Supp.

477; *Reynolds v. Ellis* (D.C., N.D. Ga., 1947) 74 F. Supp. 336.

These cases are sometimes referred to as indicative of expanding federal jurisdiction in the field of protection of privacy. They do not indicate that all violations of privacy are within the jurisdiction of the District Court. Since it appears from the averments of the complaint that the invasion of privacy which is the subject matter of the complaint is not incident to an arrest or search or seizure such as referred to in the Fourth Amendment, facts requisite to federal jurisdiction [Fed. R. Civ. P., Rule 8(a)(1), 28 U.S.C.A.] do not affirmatively appear, this Court of limited jurisdiction [*Shamrock Oil Co. v. Sheets* (1941) 313 U.S. 100, 108-109] presumably lacks jurisdiction of the cause of action. [*New York Life Ins. Co. v. Kaufman* (9th Cir., 1935) 78 F. 2d 398, 400.]

IT IS ORDERED that the complaint in this action is hereby dismissed for lack of jurisdiction [Fed. R. Civ. P., Rule 12(b)(1), 28 U.S.C.A.] with twenty days leave to amend.

IT IS FURTHER ORDERED that this dismissal shall not operate as an adjudication upon the merits [Fed. R. Civ. P., Rule 41(b), 28 U.S.C.A.]

It is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the parties appearing in this cause.

Dated: March 28, 1962.

Albert Lee Stephens, Jr.
United States District Judge

APPENDIX F.

Amended Complaint for Damages for Violation of Civil Rights.

In the United States District Court, Southern District of California, Central Division.

Angelynn York, Plaintiff, v. Ron Story, Louis Moreno and Henry Grote, Defendants. No. 898-61-S.

The plaintiff complains of the defendants and alleges:

I

Plaintiff is a citizen of the United States.

II

The defendants are officers of the Police Department of the City of Chino, State of California; the defendants Story, Moreno and Grote being police officers; they will be hereinafter so designated; at all times herein said defendants acted under color of authority as such officers.

III

This Court has jurisdiction herein under the Federal Civil Rights Act, 42 USC 1983 and 28 USC Sec. 1343(3) and (4).

IV

In October, 1958, the plaintiff went to the police department of the City of Chino, for the purpose of filing charges in connection with an assault upon her.

She was advised by the defendant Story, that it was necessary to take photographs of her; he took the plaintiff in said police station, locked the door and directed the plaintiff to undress. Thereupon he took photographs

of the plaintiff in the nude. He directed the plaintiff to take various indecent positions, one of which was sitting in the nude, with her legs spread apart; thereupon said defendant took photographs of the plaintiff in that and other positions. Said photographs were not made for any lawful or legitimate police purposes. Said photographs are referred to herewith, incorporated herein as though fully set forth and contract print copies of three of them are attached hereto as Exhibit I. (Because of their nature said prints are attached hereto in a sealed envelope and request is hereby made that said prints be not examined by others than the court and by counsel save upon order of Court.)

The plaintiff objected to being undressed, and stated to said defendant that there was no need to take photographs of the plaintiff in the nude, or in the positions aforesaid, because the bruises would not show up in any photograph.

A policewoman was present at said police station, but was not requested to be present in the room where the pictures were taken, and was not present in said room; nor was any other person, other than the plaintiff and said defendant.

Thereafter, and in October, 1958, said defendant advised plaintiff that the pictures did not come out and that they were destroyed by him.

Instead, said defendant circulated said photographs among the personnel of the police department of the City of Chino.

In April, 1960, the defendants, Moreno and Grote, at said police station in Chino, using police photographic equipment, made duplicates of said photographs, and thereupon and thereafter, circulated said duplicates among the personnel of the Chino Police Department.

The plaintiff did not learn of the action of the defendants, Moreno and Grote aforesaid, nor the action of the defendant Story aforesaid, pertaining to the circulation by him of the photographs, until December of 1960.

V

All of the acts of the defendants aforesaid were as police officers of said Chino Police Department; but were in excess of their authority as such police officers. Said acts violated and deprived plaintiff of her right to privacy and liberty and constituted an unreasonable search and seizure contrary to and prohibited by the Fourth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act.

VI

The acts of the defendants aforesaid were committed unlawfully, intentionally, maliciously and oppressively, with the knowledge on the part of the defendants that they were exceeding their authority as police officers and with the further knowledge that they were depriving the plaintiff of rights guaranteed to her by the Constitution of the United States and by the Federal Civil Rights Act by virtue whereof the plaintiff is entitled to punitive and exemplary damages.

Wherefore, the plaintiff prays for damages as to each of the defendants as follows:

1. The sum of Ten Thousand ($10,000.00) Dollars as actual damages;

2. The sum of Fifteen Thousand ($15,000.) Dollars additionally as punitive damages;

3. For costs of suit herein; and

4. For such other and further relief as to the Court seems just and proper.

A. L. Wirin
Fred Okrand
Albert J. Fink
By Fred Okrand
Fred Okrand
Attorneys for Plaintiff.

APPENDIX G.

Order Dismissing Action.

United States District Court, Southern District of California, Central Division

Angelynn York, Plaintiff, vs. Ron Story, Louis Moreno and Henry Grote, Defendants. Civil No. 898-61-S.

It appearing to the Court that:

1. By order of Court filed March 29, 1962, the complaint in this action was dismissed for lack of federal jurisdiction, with twenty days leave to amend.

2. An amended complaint has been filed in this action alleging no acts essentially different from the original complaint which would confer jurisdiction on this Court of limited jurisdiction.

Therefore, It Is Ordered that this action be dismissed. [Fed. R. Civ. P., Rule 12(b)(1), 28 U.S.C.A.]

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the parties appearing in this action.

Dated: June 26, 1962.

Albert Lee Stephens, Jr.,
United States District Judge